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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ADAR YAMURA WRIGHT,

Defendant and Appellant.

H044844

(Santa Clara County
Super. Ct. No. C1238177)

I. INTRODUCTION

Defendant Adar Yamura Wright¹ appeals after a jury found him guilty of second degree murder (Pen. Code, § 187)² and found true the allegation that he used a deadly and dangerous weapon, a knife, during the commission of the offense (§ 12022, subd. (b)(1)). The trial court found that defendant had a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)), and sentenced defendant to 36 years to life.

On appeal, defendant claims that the trial court committed two instructional errors regarding self-defense. First, defendant contends that the trial court erred when it instructed the jury that in defending against murder or great bodily harm, defendant must

¹ The record on appeal contains documents that also refer to defendant as “Adar Yamuro Wright.”

² All further statutory references are to the Penal Code unless otherwise indicated.

have acted *only* because of his belief that he was in imminent danger of death or great bodily injury. Second, defendant contends that the trial court erroneously instructed the jury that if it determined that defendant was the initial aggressor but had used only non-deadly force, defendant could use deadly force in self-defense if his opponent had responded to defendant's initial aggression "with such sudden and deadly force that the defendant *could not withdraw from the fight.*" (Italics added.) Defendant argues that the trial court should have instructed the jury that he had the right to use self-defense as the initial aggressor if he could not withdraw *in safety* from the fight.

For reasons that we will explain, we will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution Case*

Edgar Buenrostro testified that on July 25, 2012, he was driving by St. James Park in San Jose when he saw a man wearing a "doo-rag" walk up "kind of quick" behind a man wearing a basketball jersey. The man wearing the "doo-rag," which Buenrostro described as a piece of cloth covering the man's head, was also wearing black gloves, similar to batting gloves.

Buenrostro saw the "doo-rag" man grab the man wearing the jersey and start swinging at the man's chest. At first Buenrostro thought the "doo-rag" man was punching the man wearing the jersey, but when Buenrostro looked closely, he saw that the "doo-rag" man was stabbing him. The man in the jersey turned to face the "doo-rag" man and tried to push him off. The man in the jersey then started to walk away, but when Buenrostro looked in the man's direction again, he saw that he was on the ground. Buenrostro stopped his car and checked to see if the man in the jersey was okay. Four or five people were standing around the man, who was face down on the ground and struggling to breathe. Buenrostro called 911. The man in the "doo-rag" was standing somewhere nearby looking in the jersey man's direction and yelling something.

At 8:40 p.m., San Jose Police Officer Ricardo Fontanilla responded to the report of a man face down on the ground with his eyes rolled up at St. John and Second Streets. Officer Fontanilla found the man on the sidewalk.

The man in the jersey was later identified as Phillip Briggs. Briggs had been stabbed five times and died from two stab wounds to his chest. In addition to the chest wounds, Briggs had been stabbed three times on his left upper arm.

Briggs also had an abrasion on his left eyelid and a laceration to his chin, both of which may have been caused by falling to the ground. Briggs had an irregular abrasion on his left shoulder, which was a superficial sharp force injury and may have been a failed stab attempt. There were also injuries to Briggs's right elbow, right wrist, and right hand. Briggs's injuries were consistent with a physical struggle. Briggs had acute methamphetamine intoxication at the time of his death.

The day after the incident, the owner of a Mazda that had been parked at the crime scene contacted the police. The owner had noticed when he had gotten the car home that there was damage to the right-rear quarter panel, which was the side of the car closest to the sidewalk.

Sarah Elledge, formerly known as Sarah Morris, had known Briggs since 2009. The two started dating in 2011, but they were not exclusive. At first they only saw each other every few months, but in the summer of 2012 they started to see each other frequently.

Around March 2012, while she was romantically involved with Briggs, Elledge began a romantic relationship with defendant, whom she knew as "Michael." Defendant stayed at Elledge's house on East St. James Street approximately three nights a week. Elledge did not tell defendant and Briggs about each other, but "it wasn't a secret."

Around this time, Elledge was drinking and smoking methamphetamine and marijuana, which clouded her memory. Defendant and Briggs were also using

methamphetamine and marijuana. On June 9, 2012, Briggs went to jail for possession of a controlled substance. He was released on July 24, 2012.

Elledge was at the St. James Light Rail Station when she first ran into Briggs after his release. They went to her house and at some point in the early evening, defendant arrived. The men acted like they were happy to see each other and spent some time catching up. They had known each other longer than she had known either of them. The group spent a couple of hours together at Elledge's house and both men seemed relaxed. Eventually defendant left, and Briggs stayed until after midnight.

Elledge saw defendant again either the next day or shortly thereafter, and nothing seemed out of the ordinary. Elledge saw defendant three or four times that week, and each time his demeanor was normal. Defendant did not say anything to her about getting into a fight with Briggs and never mentioned that a mutual friend of theirs had died.

On August 1, 2012, police searched Elledge's home and took some of the knives they found. The folding knife located in her bedroom had belonged to Briggs.

Also on August 1, 2012, San Jose Police Officer Anthony Kilmer arrested defendant. Officer Kilmer collected a pair of white and black batting gloves from him.

Police interviewed defendant about the homicide at St. John and Second Streets, and defendant's story changed several times during the interview. Defendant first said that he did not know anything about the homicide or who was killed, but he was aware that it had been on the news. When police mentioned Briggs's name, defendant acknowledged that he knew him but said that he had not seen him in a long time. Defendant then said that he had seen Briggs in the park the day before he was murdered. Police told defendant that they had been informed that he murdered Briggs, which defendant denied. Police asked defendant to explain what happened.

Defendant stated that he and Briggs came across each other and were talking about a woman they were both involved with, and Briggs pulled out a knife and tried to stab him. Briggs missed and defendant grabbed the knife. While they were fighting and

swinging, defendant “poked [Briggs] on accident” when he was trying to defend himself.³ Defendant then dropped the knife and ran. Defendant said this occurred by the park and that someone named “Jay” was there. He also mentioned that they hit a parked car while they were fighting.

At another point in the interview, defendant said Briggs dropped the knife when they hit the car during the fight and defendant picked it up and “hit” Briggs with it once. Defendant dropped the knife, but Briggs was still swinging at him and they were holding onto each other’s shirts. When they finally released each other, defendant ran. Briggs ran, too, because “everybody else was still tryin’ to get him.” Defendant stated that people were mad at Briggs for snitching and again said that Jay was there. Defendant did not know what happened after that because he ran in one direction and Jay ran in the other. Defendant said he thought “Jay might have done it.”

Later in the interview, defendant stated that when Briggs pulled out the knife, defendant rushed him and they both fell to the ground. While they were wrestling on the ground, defendant picked up the knife, which had also fallen to the ground, and hit Briggs with it.

Police told defendant in a ruse that he needed to “com[e] clean” because they had surveillance video that showed him walking up behind Briggs and hitting him approximately five times. Defendant responded, “Okay, I started the fight.” Defendant said that Briggs was talking about trying to get him and they started fighting. Defendant said that he was the one who initially had the knife, which he kept for protection. Defendant had the knife in his hand and knew he hit Briggs with it once, but after that he did not know how many times he stabbed Briggs because he had the knife in his hand while he was punching him and it did not feel like he was poking him. Defendant

³ One of the homicide detectives who interviewed defendant testified that “poke” is slang for stab.

acknowledged that while they were running away from each other, Briggs fell, but defendant stated that Briggs was still alive. Defendant said that he did not mean to kill Briggs and he did not intend to kill Briggs because he was afraid of him.

Defendant agreed to show the police where he dropped the knife, but when they went to that location, police were unable to find it.

When they returned to the police station, defendant told police that he went after Briggs because the “D-boys” or “Drug Boys” pressured him into it and would have shot him otherwise. Defendant said he felt like he was trapped, but he denied planning Briggs’s murder. When the police raised the possibility of the death penalty, defendant said, “ ‘[I]f I explain it then, . . . am I going to jail for that?’ ”

Defendant did not have any wounds consistent with struggling with someone armed with a knife.

B. *Defense Case*

San Jose Police Officer Sarah Stephens testified that the owner of the Mazda that was at the crime scene brought the car to the police department on July 26, 2012. The Mazda had a dent in its right-rear quarter panel, which was not there when the owner parked the car on St. John Street.

Defense investigator Diane Rivera testified that she interviewed Buenrostro on October 12, 2016. Buenrostro stated that he was not wearing his glasses when he was driving down St. John Street. He noticed a man walk up behind another man, but then Buenrostro looked away to see if he recognized anyone in the park. When he looked back at the two men, they were facing each other and fighting, with one man punching the other in the chest. The other man had his hands up either to take a swing back or push away. Buenrostro looked away again, but then saw the men breaking apart and one man heading east. Buenrostro told Rivera that he did not see the first contact between the men. At some point Buenrostro realized “the second man” had something in his hand, but he could not describe what it was. Buenrostro then realized, “ ‘[O]h, my God, he’s

stabbing him.’ ” It all happened very quickly. Buenrostro parked his car and rushed over to the “first person” who had fallen on the ground and was surrounded by a group of people trying to help.

Defendant testified on his own behalf. Defendant acknowledged that he had given the police six or seven different versions of what happened, but stated that one of the versions was partially correct: Briggs had a knife. Defendant lied to police about not knowing Briggs and suggested that someone else made him do it because he figured that if he told the police what they wanted to hear, he would be able to go home.

Defendant admitted the following prior convictions: on November 1, 2011, he was convicted of misdemeanor false impersonation in violation of section 529; on June 7, 2011, he was convicted of misdemeanor battery on an intimate partner in violation of section 243, subdivision (e); on July 28, 2008, he was convicted of misdemeanor battery in violation of section 243, subdivision (a); on July 13, 2005, he was convicted of misdemeanor petty theft in violation of section 666; and on October 26, 2004, he was convicted of felony residential burglary in violation of sections 459 and 460, subdivision (a).⁴ Defendant stated that he had never been arrested for, or convicted of, possession of a weapon of any kind.

Defendant testified that when he woke up at Elledge’s house on the morning of July 24, 2012, Briggs was there. Defendant was surprised to see him and told him so. Briggs told defendant that he and Elledge were friends. The three of them conversed, and at some point defendant and Briggs went to a 7-Eleven. On the way there, Briggs mentioned that he wanted to sleep with Elledge. Defendant told Briggs that he was involved with her and he would appreciate it if Briggs did not interfere in their relationship. Briggs said that he would not do anything like that to defendant. The

⁴ The parties later stipulated to defendant’s prior convictions.

men went back to Elledge's house and defendant and Elledge smoked some marijuana. At some point, defendant left.

Defendant returned to Elledge's house sometime between 10:00 and 11:00 that night. The window that defendant often used to stick his head inside the residence was blocked, which was unusual, and when defendant knocked on the window, he heard Briggs's voice. Defendant called out to ask if Elledge was there, and Briggs responded that she was busy and not to come back. Defendant left. His feelings were hurt because he thought Elledge was cheating on him. Defendant felt betrayed and a little angry.

The next morning, on July 25, 2012, defendant was in St. James Park, intending to go back to Elledge's house. Around 11:00 a.m., he saw Briggs and Elledge walking hand in hand before they got on the light rail together.

Around 8:00 p.m., defendant headed back toward St. James Park, intending to go to Elledge's house. When defendant turned onto St. John Street, he saw Briggs and a female friend coming toward him. Defendant and Briggs came face to face. Defendant was unarmed and had not been looking for Briggs; he just happened upon him. They greeted each other, and then defendant asked, "[S]o it's like that?" Briggs acted like he did not know what defendant was talking about, and defendant told him that was "kind of messed up." Defendant felt angry and betrayed, but he did not start the fight. He wanted an explanation. They exchanged words, and Briggs said "he'll do what the fuck he wants." Defendant asked Briggs what it was he was saying, and that is when Briggs "flashed" and his hands went up, ready to fight.

In response, defendant put his hands up, too. The men began punching each other in the head and then Briggs backed up a little bit and pulled out a folding knife, which he held in his left hand. Briggs tried to charge defendant and stab him with the knife, but defendant stood his ground and grabbed Briggs's left arm. They hit a parked car and defendant fell onto his back. Briggs got on top of defendant and tried to punch him. As defendant tried to block the blows and yelled at Briggs to get off of him, he saw the knife

on the ground, picked it up, and stabbed Briggs. Defendant stated that he was afraid for his safety and became more fearful when Briggs pulled out the knife.

Defendant stated that he did not know he had stabbed Briggs five times and he did not intend to kill him. Somebody started yelling, and Briggs got off of defendant and ran down the street. Defendant ran in the other direction with the knife. He tossed the knife in the dirt when he got several blocks away.

Defendant went to Elledge's house, but no one was home. Elledge eventually arrived and defendant told her he had gotten into a fight. He did not tell her it was with Briggs because she did not seem to care about the fight. He left Elledge's house around midnight and passed by St. James Park, which was cordoned off with yellow police tape. Defendant learned that Briggs had died. He did not call the police because he did not want to go to jail.

On cross-examination, defendant stated that he thought by telling the police that he started the fight with Briggs, they would let him go home. Defendant agreed that when he saw Briggs the night of the fight, he did not have to talk to him and he did not have to fight him. He could have walked away, but he chose to fight. Defendant testified that when Briggs pulled the knife out, he could have run away and could have yelled for help but he was scared of getting stabbed. When asked whether he thought that if he did not kill Briggs, Briggs would kill him, defendant responded, "I don't want to answer that one." When asked again, defendant said, "Yes. You never know. If you get stabbed, you could die by a stab." Defendant stated that he killed Briggs in self-defense; he also stated that he did not intend to kill him. Defendant testified that when Briggs got the knife out, he yelled at him to put it away, but Briggs charged him with it.

The parties stipulated that Briggs had been convicted of misdemeanor intimate partner battery in violation of section 243, subdivision (e) on March 1, 2012; misdemeanor intimate partner battery in violation of section 243, subdivision (e) and misdemeanor brandishing of a knife in violation of section 417 on January 17, 2012; and

misdemeanor battery in violation of section 243, subdivision (a) on August 22, 2006.

The parties also stipulated that Briggs possessed a knife when he was contacted by police on September 18, 2011, March 22, 2009, and November 17, 2004.

C. *Prosecution's Rebuttal*

San Jose Police Detective Juan Vallejo participated in defendant's interview on August 1, 2012. Detective Vallejo testified that defendant never said there was a woman with Briggs when defendant came face to face with him before the fight. Defendant also did not mention that he and Briggs went to a 7-Eleven together on July 24, 2012.

Detective Vallejo authenticated photographs taken of defendant on August 1, 2012.

Defendant did not have any injuries except for a circular mark on his bicep, but defendant told Detective Vallejo that the mark was not an injury.

Detective Vallejo testified that Buenrostro consistently said that "the doo-rag man surprised the jersey man" and that the "doo-rag man" attacked the "jersey man" from behind.

D. *Charges, Verdicts, and Sentence*

Defendant was charged with murder (§ 187). It was also alleged that defendant used a dangerous and deadly weapon, a knife, during the commission of the offense (§ 12022, subd. (b)(1)) and that defendant had been convicted of a prior strike (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony (§ 667, subd. (a)).

A jury found defendant guilty of second degree murder and found the dangerous and deadly weapon allegation true. The trial court found that defendant had been convicted of a prior strike and a prior serious felony.

The trial court sentenced defendant to an aggregate term of 36 years to life, comprised of 30 years to life for the murder plus one year for the use of a deadly and dangerous weapon and five years for the prior serious felony conviction.

III. ANALYSIS

A. *Self-Defense Instruction*

Defendant contends that the trial court incorrectly instructed the jury on justifiable homicide committed in perfect self-defense. Defendant asserts that the trial court should not have instructed the jury that “[d]efendant’s belief [in the need for self-defense] must have been reasonable and *he must have acted only because of that belief.*” (Italics added.) Defendant argues pursuant to sections 197 and 198 that the requirement that a party act solely because of his or her belief in the need for self-defense applies only when the party “believes that . . . a crime is about to occur.” Defendant contends that when, as here, a party uses self-defense in response to “*an actual attempt* to inflict great bodily injury,” section 198 does not require the party’s belief in the need for self-defense to be the sole basis for his or her use of self-defense. Defendant claims that the error “removed an element of the offense,” lightened the prosecution’s burden of proof, and “removed a defense to homicide which has been available . . . for 140 years.”

1. Trial Court Proceedings

During the jury instruction conference, the trial court referenced the self-defense instruction at issue here once. The trial court stated, “Clearly, self-defense comes in. There’s no controversy whatsoever about that.” Neither party responded to the court’s statement.

The trial court instructed the jury on justifiable homicide committed in self-defense with CALCRIM No. 505 as follows: “The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not

sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to himself. Defendant's belief must have been reasonable and *he must have acted only because of that belief*. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified. [¶] When deciding whether defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating. [¶] *Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter.” (First italics added, second italics in original.)

Defendant did not object to the trial court's instruction.

2. Relevant Statutes

Penal Code sections 197 through 199 provide the statutory law on justifiable homicide committed by a nonpublic officer in self-defense. Sections 197 and 198 are pertinent here.

Section 197 provides: “Homicide is also justifiable when committed by any person in any of the following cases: [¶] (1) When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person. [¶] (2) When committed in defense of habitation, property, or person, against one who

manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein.

[¶] (3) When committed in the lawful defense of such person, or of a spouse, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he or she was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed. [¶] (4) When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.”

Section 198 states: “A bare fear of the commission of any of the offenses mentioned in subdivisions 2 and 3 of Section 197, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, *and the party killing must have acted under the influence of such fears alone.*” (Italics added.)

3. Analysis

“ ‘It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.’ [Citations.]” (*People v. Diaz* (2015) 60 Cal.4th 1176, 1189.)

“The duty to instruct, *sua sponte*, on general principles closely and openly connected with the facts before the court also encompasses an obligation to instruct on defenses, including self-defense . . . , and on the relationship of these defenses to the

elements of the charged offense.” (*People v. Seden* (1974) 10 Cal.3d 703, 716 (*Seden*), overruled on another ground by *People v. Breverman* (1998) 19 Cal.4th 142, 175.) However, “[u]nlike the rule obliging the court to instruct on lesser included offenses and to give requested instructions whenever there is ‘any evidence deserving of any consideration whatsoever’ [citation], the duty to give instructions, *sua sponte*, on particular defenses and their relevance to the charged offense arises only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.” (*Seden*, *supra*, at p. 716.)

We review de novo whether a jury instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) “Review of the adequacy of instructions is based on whether the trial court ‘fully and fairly instructed on the applicable law.’ [Citation.] ‘“In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.” [Citation.]’ [Citation.] ‘Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.’ [Citation.]” (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

Although defendant did not object to the trial court’s instruction on perfect self-defense, he now contends that the instruction erroneously required the jury to determine whether he “acted *only* because of [his] belief” in the need for self-defense. (Italics added.) Defendant asserts that “this was a section 197 (1) case” because the evidence showed that he was resisting Briggs’s attempt to inflict great bodily injury on him. Defendant argues, “[W]here a defendant is resisting *an actual attempt* to inflict great bodily injury as explicitly covered in section 197, subdivision (1)—and not simply a fear of the decedent’s intent or design—self-defense is proper. In such a scenario, the proper inquiry for the jury is (1) whether the decedent was in fact attempting to inflict great

bodily injury on another, and (2) whether the defendant killed while resisting that attempt. Under the plain language of section 198, the separate question of whether the defendant acted for any other reason . . . forms no part of the calculus as to whether self-defense is proper.”

Section 197 is a codification of a common law defense. (*People v. Ceballos* (1974) 12 Cal.3d 470, 477-478; *People v. Jones* (1961) 191 Cal.App.2d 478, 481.) Where statutes are merely codifications of the common law, they are assumed to be limited by the corresponding traditional common law rules. (See *Parsley v. Superior Court* (1973) 9 Cal.3d 934, 938-939.) Contrary to defendant’s argument, even the earliest cases involving section 197 recognized that to establish perfect self-defense, “the circumstances must [have] be[en] sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.” (*People v. Herbert* (1882) 61 Cal. 544, 546 (*Herbert*).)

Although section 198 makes no reference to section 197, subdivision (1), it is beyond dispute that the element of reasonableness, in terms of the defendant’s fear of death or imminent peril, is necessary to establish perfect self-defense under any set of circumstances.⁵ (See *People v. Randle* (2005) 35 Cal.4th 987, 998-999, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) The existence or nonexistence of a reasonable fear is primarily what distinguishes justifiable homicide from manslaughter. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 581; *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262.)

Likewise, we conclude that a defendant’s motivation to inflict harm is also a necessary consideration in a section 197, subdivision (1) case. In *People v. Nguyen* (2015) 61 Cal.4th 1015, 1044 (*Nguyen*), the California Supreme Court recognized that

⁵ Defendant concedes in his reply that he “does not dispute the applicability of th[e] [imminence and reasonableness] elements.”

a defendant who engages in a lethal response to imminent deadly force cannot claim self-defense if “he did not act on the basis of fear alone but also on a desire to kill.” The court observed that “[s]everal decisions have interpreted the phrase ‘such fears alone’ in section 198.” (*Id.* at p. 1045.) The court quoted *People v. Trevino* (1988) 200 Cal.App.3d 874 (*Trevino*), which “held that ‘an instruction which states that the party killing must act under the influence of such fears alone, is a correct statement of the law.’ ” (*Nguyen, supra*, at p. 1045.)

Defendant asserts in his reply that *Nguyen* left open “the precise question presented here.” Defendant points to the following excerpt from that opinion: “We note that defendant did not argue in the trial court, nor has he argued on appeal, that the jury should have been instructed that acting based on mixed motives is permissible so long as reasonable fear was the but-for cause of his decision to kill. We therefore have no occasion to consider whether such a rule would be consistent with section 198 as interpreted in *Trevino* or other cases.” (*Nguyen, supra*, 61 Cal.4th at p. 1046.)

In *Trevino*, the Court of Appeal acknowledged that “a person who feels anger or even hatred toward the person killed, may . . . justifiably use deadly force in self-defense.” (*Trevino, supra*, 200 Cal.App.3d at p. 879.) Indeed, in some instances, “it would be unreasonable to require an absence of any feeling other than fear, before the homicide could be considered justifiable. Such a requirement is not a part of the law” (*Ibid.*)

However, the law does “require[] that the party killing *act* out of fear alone.” (*Trevino, supra*, 200 Cal.App.3d at p. 879.) “The party killing is not precluded from feeling anger or other emotions save and except fear; however, those other emotions cannot be causal factors in his [or her] decision to use deadly force. If they are, the homicide cannot be justified on a theory of self-defense. But if the only causation of the killing was the reasonable fear that there was imminent danger of death or great bodily

injury, then the use of deadly force in self-defense is proper, regardless of what other emotions the party who kills may have been feeling but not acting upon.” (*Ibid.*)

The jury in *Trevino* was instructed on perfect self-defense with a former version of CALJIC No. 5.12. (*Trevino, supra*, 200 Cal.App.3d at p. 877.) As relevant here, the instruction stated: “ ‘The party killing *must have acted under the influence of such fears alone* and under the belief that such killing was necessary to save himself from death or great bodily injury.’ ” (*Id.* at p. 877, fn. 6, italics added.) The court determined that the instruction “properly instructs the jury that the party killing must have *acted* under the influence of reasonable fears alone. It does not eliminate a feeling of anger or any other emotion so long as that emotion was not part of the cause of the use of deadly force. It is, therefore, a correct statement of the law of self-defense.” (*Id.* at pp. 879-880.)

Here, the jury was instructed that “[d]efendant’s belief [in the need for self-defense] must have been reasonable and *he must have acted only because of that belief.*” (Italics added.) Like the pattern instruction at issue in *Trevino*, CALCRIM No. 505 as given here did not remove the possibility that defendant held other feelings about Briggs, and it did not inform the jury that it had to reject self-defense if defendant harbored feelings other than fear. Instead, the instruction correctly required that defendant’s fear for his life be both reasonable and the sole “but for” cause of the murder.⁶

Defendant also contends that the instruction constituted an ex post facto violation because it amounted to “an unforeseen and impermissibly retroactive abolition of a defense which had long been recognized,” namely, that a party may act on his or her reasonable belief in the need for self-defense in response to an actual attempt to inflict

⁶ To the extent that defendant contends that the instruction on perfect self-defense should have been clarified, his claim has been waived. “A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial.” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

great bodily injury or death with no requirement that the party act *solely* based on that belief. We conclude otherwise.

The ex post facto clause forbids the enactment of “ ‘any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed’ ” (*Collins v. Youngblood* (1990) 497 U.S. 37, 42.) Although “[o]n its face the ex post facto clause operates as a check only on the exercise of legislative power, . . . similar limitations apply to judicial enlargement of a criminal act under principles of due process.” (*People v. Brown* (2004) 33 Cal.4th 382, 391.)

As we stated above, however, California common law has long recognized that to establish perfect self-defense, “the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.” (*Herbert, supra*, 61 Cal. at p. 546; see also *People v. Ye Park* (1882) 62 Cal. 204, 207-208 [“the circumstances must not only be sufficient to excite the fears of a reasonable person, but ‘the party killing must have acted under the influence of such fears alone’ ”]; *People v. Adams* (1890) 85 Cal. 231, 235 [self-defense instructions properly required that the defendant “ ‘acted under the influence of such fears alone’ ”]; *People v. Levitt* (1984) 156 Cal.App.3d 500, 509 [“if the degree of force used was influenced by any motivations aside from a belief in the necessity to act in self-defense, then manslaughter was an appropriate verdict on that ground alone. In order for homicide to be completely justified in self-defense, ‘the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.’ [Citations.]”], disapproved of on another ground by *People v. Johnson* (2016) 62 Cal.4th 600, 649, fn. 6.) Thus, the trial court’s instruction did not deprive defendant of a defense available at the time of the offense.

For these reasons, we conclude that the trial court's instruction on justifiable homicide committed in self-defense, which required the jury to determine whether defendant acted only because of his belief in the need for self-defense, was proper.

B. *Instruction on the Right of an Initial Aggressor to Use Self-Defense*

Defendant contends that the trial court's instruction on the right of an initial aggressor to use self-defense violated his right to due process and a fair trial. Defendant asserts that the court incorrectly told the jury that "if the defendant used only nondeadly force and the opponent responded with such sudden and deadly force *that the defendant could not withdraw from the fight*, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting or communicate the desire to stop to the opponent or give the opponent a chance to stop fighting." (Italics added.) Defendant argues that the court should have instructed the jury that he had the right to use self-defense if he could not "withdraw *in safety* from the fight."

1. Trial Court Proceedings

The prosecution requested the trial court to instruct the jury on the use of self-defense by a person who engages in mutual combat or is the initial aggressor with CALCRIM No. 3471. The court stated that there was an evidentiary basis for the instruction and asked defendant whether he had a "position on it." Defendant responded, "No, Your Honor. Submitted."

The trial court instructed the jury with CALCRIM No. 3471 as follows: "A person who engages in mutual combat or who starts a fight has a right to self-defense only if: [¶] 1. he actually and in good faith tried to stop fighting; [¶] AND [¶] 2. he indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting; [¶] AND [¶] 3. he gave his opponent a chance to stop fighting. [¶] If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight. [¶] However, if the defendant used only non-deadly force, and *the opponent responded*

with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting. [¶] A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.” (First italics added, second italics in original.)

2. Legal Principles

Generally, under California law, an initial aggressor “who wrongfully attacks, or who voluntarily engages in a fight, and is met by a counterattack, has no privilege to stand his [or her] ground and defend.” (1 Witkin & Epstein, Cal. Crim. Law (4th ed. 2012) Defenses, § 78, p. 519.) However, there are certain situations where an initial aggressor may act in self-defense. “If the original aggressor or participant in an unlawful fight does attempt to withdraw, and so informs the opponent, and is nevertheless pursued and attacked, he or she may have the usual right of self-defense to this new attack.” (*Id.*, § 79, p. 521; see also § 197, subd. (3); *People v. Hecker* (1895) 109 Cal. 451, 463 (*Hecker*).) In addition, when an initial aggressor uses only non-deadly force and his or her opponent “responds in a sudden and deadly counterassault, the original aggressor need not attempt to withdraw and may use reasonably necessary force in self-defense. [Citations.]” (*People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201 (*Gleghorn*).)

“When we review challenges to a jury instruction as being incorrect or incomplete, we evaluate the instructions given as a whole, not in isolation. [Citation.] ‘For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.’ ” (*People v. Rundle* (2008) 43 Cal.4th 76, 149, disapproved of on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

3. Analysis

Here, the trial court employed CALCRIM No. 3471 to inform the jury that if it determined that defendant engaged in mutual combat or was the initial aggressor, “if . . . defendant used only non-deadly force, and *the opponent responded with such sudden and deadly force that . . . defendant could not withdraw from the fight*, then . . . defendant had the right to defend himself with deadly force and was not required to try to stop fighting or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting.” (Italics added.)

Relying on *Gleghorn*, *supra*, 193 Cal.App.3d at page 201 and *People v. Quach* (2004) 116 Cal.App.4th 294 (*Quach*), defendant contends that the instruction was improper because it is not enough to be able to withdraw from combat; an initial aggressor must be able to withdraw safely. In support of his argument, defendant seizes on the use of the phrase “retreat with safety” in *Gleghorn*, *supra*, at page 201 and *Quach*, *supra*, at pages 301-303. However, these cases, along with others discussing this concept, use both terms—“withdraw” and “retreat with safety”—interchangeably.

For example, in *Hecker*, the California Supreme Court determined: “The defendant was entitled to have the jury instructed that even if he was in the act of committing a forcible trespass in endeavoring to take the horse, if his act amounted to no more than a trespass, [the victim] was not justified in trying to kill him, if he did try, in attempting to prevent it. And if, under these circumstances, [the victim] did make the first felonious assault upon defendant, defendant in turn would be justified in killing [the victim] if the circumstances of [the victim’s] felonious assault were sufficient to excite defendant’s fears as a reasonable man that he was in danger of death or great bodily injury, and he acted under these fears alone, and had in good faith declined further struggle before firing the fatal shot, or was put in such sudden jeopardy by the acts of deceased that he *could not withdraw*, and if it was thus that [the victim] met his death.” (*Hecker*, *supra*, 109 Cal. at p. 461 italics added.) Later in the opinion, the court

explained that the law provides that if “[a] counter assault [against an initial aggressor] be so sudden and perilous that no opportunity be given to decline or to make known to his adversary his willingness to decline the strife, [and] if [the initial aggressor] *cannot retreat with safety*, then as the greater wrong of the deadly assault is upon his opponent, he would be justified in slaying, forthwith, in self-defense.” (*Id.* at p. 464, italics added.)

In *Gleghorn*, the Court of Appeal stated the rule as follows: “[W]hen the victim of simple assault responds in a sudden and deadly counterassault, the original aggressor need not attempt to withdraw and may use reasonably necessary force in self-defense.” (*Gleghorn, supra*, 193 Cal.App.3d at p. 201.) There, the jury had been instructed: “ ‘Where the original aggressor is not guilty of a deadly attack, but of a simple assault or trespass, the person assaulted has no right to use deadly or other excessive force. [¶] And, where the counter assault is so sudden and perilous that no opportunity be given to decline further to fight and he cannot retreat with safety he is justified in slaying in self-defense.’ ” (*Ibid.*)

In *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75, footnote 2 (*Sawyer*), the Court of Appeal approved the following instruction: “ ‘Where a person seeks or induces a quarrel which leads to the necessity in his own defense of using force against his adversary, the right to stand his ground and thus defend himself is not immediately available to him, but, instead he first must decline to carry on the affray, must honestly endeavor to escape from it, and must fairly and clearly inform his adversary of his desire for peace and of his abandonment of the contest *unless the attack is so sudden and perilous that he cannot withdraw*. Only when he has done so will the law justify him in thereafter standing his ground and using force upon his antagonist.’ ”

In *Quach*, the Court of Appeal determined that the self-defense instruction at issue there was deficient because it did not include the “ ‘cannot retreat with safety’ ” language from *Hecker* or the “ ‘cannot withdraw’ ” language from *Sawyer*. (*Quach, supra*, 116 Cal.App.4th at p. 302, italics omitted.)

These cases illustrate that the concept of self-defense at issue here, i.e., when an initial aggressor may defend himself or herself with deadly force, was correctly conveyed by CALCRIM No. 3471 as given by the trial court, which stated that defendant had the right to defend himself with deadly force if he initially used only non-deadly force and his opponent responded with such sudden and deadly force that defendant could not withdraw from the fight. The instruction accurately reflected the language used not just in *Hecker*, but in subsequent cases addressing that defense. (See *Quach*, *supra*, 116 Cal.App.4th at p. 302; *Gleghorn*, *supra*, 193 Cal.App.3d at p. 201; *Sawyer*, *supra*, 256 Cal.App.2d at p. 75, fn. 2.)

Moreover, the concept of withdrawing from a fight in the face of a sudden, deadly counterattack necessarily implies that the party seeking to withdraw be able to do so safely. There is no reasonable likelihood that the jury misconstrued the instruction to require an initial aggressor to withdraw regardless of whether withdrawal could be achieved safely or not.

For these reasons, we reject defendant's claim that the trial court was obligated to instruct the jury sua sponte that as the initial aggressor, defendant could use self-defense if he initially used only nondeadly force, and the opponent responded with such sudden and deadly force that defendant could not withdraw *in safety* from the fight.

IV. CONCLUSION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

PREMO, ACTING P.J.

ELIA, J.

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